

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRIAN SPOTTS,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	
and UNITED STATES DEPARTMENT	:	
OF THE NAVY,	:	
	:	
Defendants.	:	NO. 02-792

Reed, S.J.

May 21, 2002

MEMORANDUM

Plaintiff filed the instant action against defendant the United States of America and the United States Department of the Navy (collectively, the "United States"), pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* Jurisdiction is proper under 28 U.S.C. § 1346(b). Currently pending before the Court is the motion of defendant to dismiss for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Doc. No. 3), and the response thereto (Doc. No. 4). For the reasons set forth below, the motion will be denied.

Background

On March 24, 1998, at about 7:00 p.m., plaintiff Brian Spotts slipped and fell while on duty as a security guard in Building 26 of the Naval Inventory Control Point. Plaintiff alleges that he had slipped in a puddle of water at the base of the southwest stairwell, and that as a result he suffered a right inguinal hernia requiring surgery and treatment. He filed the instant action seeking recovery for defendant's alleged negligence.

The United States has moved for dismissal under Federal Rule of Civil Procedure

12(b)(1) based on a contract between itself and R.J.B. Properties (“RJB”), dated May 15, 1996 (“RJB contract”). Defendants argue that because under the RJB contract the United States hired outside janitorial services for the facility at issue, sovereign immunity has not been waived for the instant action; thus, defendants maintain, this Court lacks subject matter jurisdiction.

Legal Standard

A motion under Rule 12(b)(1) may take the form of either a factual or a facial challenge to subject matter jurisdiction. See Singerv.Commissioner of Internal Revenue Service ___, No. 99-2783, 2000 U.S. Dist. LEXIS 57, at *9 (E.D. Pa. Jan. 7, 2000) (citing Mortensen v. First Fed. Sav. & Loan Ass’n ___, 549 F.2d 884, 891 (3d Cir. 1977)); Gould Elecs., Inc. v. United States ___, No. 99-1130, 1999 U.S. Dist. LEXIS 15769, at *2 (E.D. Pa. Oct. 12, 1999) (citing Mortensen, 549 F.2d at 891). Where, as here, there is a factual challenge to subject matter jurisdiction, the court is “not confined to allegations in the plaintiff’s complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction.” Gothav. United States, 115 F.3d 176, 179 (3d Cir. 1997) (citing Mortensen, 549 F.2d at 891-92). It is appropriate to decide a factual motion to dismiss based on an exception in the FTCA under Rule 12(b)(1). See id. (addressing a motion to dismiss based on the FTCA’s “discretionary function” exception).

“When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.” Kehr Packages v. Fidelcor, Inc. ___, 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222, 111 S.Ct. 2839 (1991) (citing Mortensen, 549 F.2d at 891); see also Development Fin. Corp. v. Alpha Hous. & Health Care ___, 54 F.3d 156, 158 (3d Cir. 1995).

However, plaintiff's burden is light; ¹ dismissal for lack of jurisdiction is only appropriate where the right claimed "is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Growth Horizons, Inc., v. Delaware County, 983 F.2d 1277, 1280-81 (3d Cir. 1993) (quoting Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 899 (3d Cir. 1987) (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 94 S.Ct. 772, 777 (1974))). The Court must be careful, however, not to allow its consideration of jurisdiction to spill over into a determination of the merit of the case, and thus must tread lightly in its consideration of the facts concerning jurisdiction. See Growth Horizons, 983 F.2d at 1281 n.5 (citing Kulick, 816 F.2d at 897; Mortensen, 549 F.2d at 891).

Analysis

The FTCA sets forth the limited circumstances under which the United States waives its sovereign immunity from suit in federal court, and establishes certain exceptions to that waiver. See Gotha, 115 F.3d at 179. This case involves one of those exceptions: the "independent contractor exception." The independent contractor exception evolved from the FTCA provision that restricts recovery to injuries arising out of the acts and omissions of government employees and, according to the Supreme Court, excludes injuries caused by independent contractors. See 28 U.S.C. § 1346(b). Drawing on agency concepts, the Supreme Court has held that the independent contractor exception turns on whether the United States "control[s] the physical conduct of the contractor in performance of the contract." Logue v. United States, 412 U.S. 521,

¹ Plaintiff's burden on a Rule 12(b)(1) factual challenge to jurisdiction is lower than the burden on a Rule 12(b)(6) motion for failure to state a claim. See Gould, 1999 U.S. Dist. LEXIS 15769, at *3 (citing Growth Horizons, Inc., v. Delaware County, 983 F.2d 1277, 1280-81 (3d Cir. 1993)).

527,93S.Ct.2215,2219(1973).Inotherwords,“thequestionhereis...whether[the contractor’s]day-to-dayoperationsaresupervisedbytheFederalGovernment.” UnitedStatesv. Orleans,425U.S.807,815,96S.Ct.1971,1976(1976).

ThisCourthaspreviouslyexaminedtheindependentcontractorexceptiontotheFTCAin Duganv.CoastalIndus.,Inc.,96F.Supp.2d481(E.D.Pa.2000),whichsimilarlyinvolveda slip-and-fallaccidentinagovernmentfacilitythathadhiredoutsidejanitorialservices.The Courtnotedthatthecontractin Duganlackedthekeypersuasivecontractuallanguageobserved inpreviouscasesapplyingtheindependentcontractorexception,suchasanexplicitstatement thatthegovernmentwouldneverexercisesupervisionoverthecontractoremployees,anexplicit orimplicitstatementholdingthecontractorresponsibleforcleaningspills,orastatementholding onlythecontractorliablefortheactsandomissionsofitsemployees. Id.at484(citing Norman v.UnitedStates,111F.3d356(3dCir.1997); Youngv.MarriottInt’l,No.97-2043,1997U.S. Dist.LEXIS17046(E.D.Pa.Oct.31,1997); Brookinsv.UnitedStates,722F.Supp.1214(E.D. Pa.1989)).Significantly,Ifoundthatbecausethecontractin Duganhadplacedthe responsibilitywiththegovernmentforidentifyingandnotifyingthecontractoroftheneedfor “emergencyservices”and“specialcleaningduties”suchascleaningspills,thedaily responsibilityforinspectingforandsupervisingthecleaningofspillsandwetspotsinthefacility laywiththegovernment.Itthereforeheldthatatthatstage,theindependentcontractorexception couldnotyetbeappliedtotheaction.

UponareviewoftheRJBcontractthere,itappearsthattheindependentexceptiondoes notapplytothisactionforreasonssimilarthoseexpoundedin Dugan.WhiletheRJBcontract doesgrantwiderresponsibilitytothecontractorforgeneralmaintenanceofthefacility,aswellas

provide a schedule for the regular cleaning of the stairwell areas, this alone is insufficient to qualify for the independent contractor exception. The RJB contract lacks the key contractual language that would either preclude the government from supervising the contractor employees, assign responsibility to the contractor for inspecting for and cleaning spills, or assign exclusive liability to the contractor for acts and omissions of the contractor's employees. Moreover, under the contract, RJB was required to respond to service calls, which pursuant to clause C.5.3.1, included cleaning up spills. (Def. Exh. 1, RJB Contract at C-9.) As with the contract in Dugan, I find that the responsibility thereby lay with the government to discover any spills and to extend a service call to the contractor to ensure their removal. Thus, the United States supervised the day-to-day operations of the contractor in this respect. ² At this stage of the case, I cannot conclude the independent contractor exception applies, and therefore conclude that jurisdiction over the instant matter is proper.

Conclusion

For the foregoing reasons, I conclude that the court has jurisdiction over this action. Accordingly, the motion for dismissal will be denied.

An appropriate Order follows.

² Additionally, to the extent it may have been negligent of the defendant to fail to make the requisite service call to the contractor, the independent contractor exception would not apply; the FTC Act does not preclude the United States from liability for its own negligence. See Borough of Lansdowne v. Severson Envtl. Servs., Inc., Civ. No. 99-3781, 2000 U.S. Dist. LEXIS 11050 at *6 (E.D. Pa. Aug. 2, 2000).

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

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v.	:	
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UNITED STATES OF AMERICA	:	
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OF THE NAVY,	:	
	:	
Defendants.	:	NO.02-792

ORDER

AND NOW, on this 21st day of May, 2002, upon consideration of motion of defendants to dismiss (Doc.No.3), the response thereto (Doc.No.4), and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** the motion is denied.

It is **FURTHER ORDERED** that defendants will file an answer to the complaint and any other necessary pleading other than a motion to dismiss no later than June 10, 2002.

LOWELLA REED, JR., S.J.